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In The
SUPREME COURT OF THE UNITED STATES

DEREK PELTO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Florida Fifth District Court Of Appeal

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Although a state may require a Defendant in a criminal case to prove he is insane by clear and convincing evidence (defined as evidence which is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction without hesitation), it may not do so when the jury instructions as to this burden do not advise the jury that it must still determine whether the state has established, beyond a reasonable doubt, the Defendant's requisite state of mind for murder; the jury instructions in this case deprived Petitioner of his Fourteenth Amendment (due process) Right to have a state prove all essential elements, beyond a reasonable doubt, of the charge against him.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Derek Pelto, respectfully asks this Court to issue a writ of certiorari: to review the judgment and opinion of the Florida Fifth District Court of Appeals in Derek Pelto v. State of Florida, Case No.: 5D05-4272. The per curiam affirmed opinion was issued on January 23, 2007 and a true and correct copy of is included in Appendix A; the order denying rehearing was issued on February 28, 2007 and a true and correct copy is also included in Appendix B.

OPINION BELOW

The decision of the Florida Fifth District Court of Appeals is found at 949 So.2d 241 (Fla. 5th DCA 2007) (Order on rehearing was on February 28, 2007).

JURISDICTION

This petition seeks review of the judgment entered by the Florida Fifth District Court of Appeal's on January 23,

2007, rehearing denied on February 28, 2007. This Court has jurisdiction to review this judgment pursuant to Title 28 United States Code §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides: (Section 1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED

A. Trial facts.

Petitioner will reference the facts in this case from the initial brief filed in the Florida Fifth District Court of Appeal and attached as Appendix C to this petition. The initial brief contains the references to the trial transcripts in the record on appeal before the Fifth District Court of Appeal.

The State of Florida charged Petitioner with first degree murder. (App. C 8) A jury found Petitioner guilty of second degree murder and the trial court sentenced him to life in prison. (App. C 8) The victim was Petitioner's girlfriend, Sarah Patten. (App. C 8) Friends of Patten went to Petitioner's apartment to pick her up. (App. C 9) The friends knocked upon the door and heard Patten crying; they heard gunshots and noises and then a crashing sound. (App. C 9) One witness at the door testified he heard a male say "be quiet" and arguing. He and another witness heard Petitioner say she has a knife in her

hand. (App. C 11) The witnesses heard yelling and screaming. (App. C 11) A witness who knew Petitioner heard Petitioner say behind the door (the witnesses were trying to gain entry at this time), Mom, Mom, she stabbed me. I am bleeding all over the place Police officers arrived and they knocked on the door; one heard a male voice say "please help me." (App. C 12) The police opened the door and they found the victim on the floor in a pool of blood - she had a knife in her hand. (App. C 13) Petitioner was also laying on the floor - there was blood on him and he had a cut in the middle of his forehead. (App. C 15)

Patten had 11 injuries to the front of her body - there was a sharp edge injury to her neck; a 9-12 inch wound to the chest. (App. C 15) There were 25 to 30 injuries to the face and hands - something like a hammer inflicted these injuries. (App. C 16) Petitioner told the police that he was attempting to end his relationship with Patten - she became violent; she used a knife to stab herself and she turned the knife on Petitioner. (App. C 18) She broke one knife and then got another one. She

got a hammer and hit Petitioner with a hammer. (App. C 18) He took the hammer away from her and hit her. (App. C 18) The police found two (2) knives (one broken) and a hammer at the scene. (App. C 19)

An expert in forensic psychiatrist, Dr. Gutman, testified that he examined Petitioner after the incident - he had a quarter to half inch deep injury to his forehead - a severe blow caused the indentation. (App. C 20) As a result of the injury, Petitioner was in a dissociative delirium and Petitioner was insane at the time of the offense. (App. C 21) Petitioner had a fracture of the frontal wall of the sinus. (App. C 21) Gutman opined that he believed could not self-inflict such an injury. (App. C 21) Dr. Gebel, an expert in neurology and brain injury, opined that a hammer may have caused Petitioner's injury. (App. C 21) This type of injury would have caused a state of severely altered consciousness - such a person would not know what was going on. (App. C 21-22)

Dr. Anderson, an expert in forensic pathology testified

that some of the injuries to the victim were self-inflicted. (App. C 22-23) Petitioner's head injury was not self-inflicted; Petitioner had defensive wounds. (App. C 23) Dr. Goldberg, an expert in neuropsychology, examined Petitioner. (App. C 23) Petitioner had brain damage. (App. C 23) Damage to the frontal lobe can produce an inability to plan ones actions. Goldberg opined that Petitioner, due to the injury, was incapable of rational activity - he could not know right from wrong; he could not control his activity. (App. C 24) Dr. Danziger is an expert in forensic psychiatry. (App. C 25) He interviewed Petitioner and the records in this case. (App. C 25) At the time of the offense, Petitioner was suffering from a delirium, due to the head injury. (App. C 25) Petitioner was insane at the time of the offense; he could not control his actions and he could not tell right from wrong. (App. C 25)

The State of Florida called Dr. Barns, a psychiatrist, in rebuttal. (App. C 26) He opined that Petitioner did not suffer any mental infirmity or disease at the time of the offense. (App.

C 27) Barns opined that Petitioner knew what he was doing - he was in a rage.(App. C 27) Dr. Tressler, an expert in forensic psychology testified he did not find evidence of insanity. (App. C 27) Petitioner did suffer a brain injury which led to a decline in a high level of functioning. (App. C 27) Dr. Hudak, a radiologist, testified that Petitioner did have a skull fracture but he could not tell if there had been an interruption of frontal lobe functions (he was not a neurologist). (App. C 28)

Over objection by Petitioner's counsel, the trial court instructed the jury that Petitioner had the burden to prove insanity by clear and convincing evidence - clear and convincing evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue (the shifting of the burden of proof came from Section 775.027, Florida Statutes). (App. C 33)

B. Appeal.

In his direct appeal to the Florida Fifth District Court of

Appeal, Petitioner argued that the insanity instruction was erroneous because 1) the Florida Supreme Court had not yet adopted the instruction (the burden of proof was a procedural matter and only the Florida Supreme Court may promulgate such instructions); 2) the instruction deprived Petitioner of his Sixth and Fourteenth Amendment Right to due process under the United States Constitution to have the state prove all of the elements of a crime beyond a reasonable doubt; 3) the instructions were misleading and confusing in light of the instructions on the state's burden of proof as to reasonable doubt; 4) the instruction was an impermissible judicial comment upon the evidence. Appendix C to petition.

After oral argument before the Fifth District Court of Appeal, the Court per curiam affirmed and later denied a motion for rehearing. Before the oral argument, the Florida Supreme Court In Re: Standard Jury Instructions in Criminal Cases (No. 2005-5), 939 So.2d 1052 (Fla. 2006), adopted the instruction (with the exception that the Florida Supreme Court

removed the word conviction in the instruction) as a matter of procedure but the Florida Supreme Court specifically noted that it did **not** decide whether the instruction was constitutional; the Court reserved any rulings upon the merits of the instruction until a later date. Consequently, the Florida Supreme Court has not ruled upon the merits of the instruction (pursuant to Article V, Section 2(a) of the Florida Constitution, the Florida Supreme Court must adopt jury instructions promulgated by the Legislature as a procedural matter because the State Legislature cannot enact procedural matters, only matters of substance).

Petitioner presented the arguments made in this petition as fundamental error. Florida courts recognize this principle as to jury instructions which misstate the burden of proof. See Burns v. State, 609 So.2d 600 (Fla. 1992). See also Bove v. State, 670 So.2d 1066 (Fla. 4th DCA 1996). Therefore, Petitioner properly presented the issues raised here to the highest state court possible. Petitioner could not seek review in

the Florida Supreme Court because of the per curiam affirmed opinion. See Jackson v. State, 926 So.2d 1262 (Fla. 2006).

In oral argument, Petitioner presented the basic arguments presented in this petition. Of course, the per curiam affirmed opinion does not directly disclose the reasoning of the Fifth District Court of Appeal but the per curiam opinion, on its face, demonstrates that the Fifth District Court of Appeal found Petitioner's arguments without merit.

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

I. Although a state may require a Defendant in a criminal case to prove he is insane by clear and convincing evidence (defined as evidence which is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction without hesitation), it may not do so when the jury instructions as to this burden do not advise the jury that it must still determine whether the state has established, beyond a reasonable doubt, the Defendant's requisite state of mind for murder; the jury instructions in this case deprived Petitioner of his Fourteenth Amendment (due process) Right to have a state prove all essential elements, beyond a reasonable doubt, of the charge against him.

This Court has held in Leland v. Oregon, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed 302 (1952), that a state may require the Defendant to establish insanity by proof beyond a reasonable

doubt. However, this Court in Leland v. Oregon, noted that in Oregon the trial court instructed the jury that the state still had to prove intent beyond a reasonable doubt, even if a Defendant raised (but did not prove) insanity. The Oregon courts required the jury to consider **all** of the evidence about state of mind. This Court in Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed 2d 267 (1987) held that a state can shift the burden of proof of self-defense to the Defendant so long as the instructions tell the jury that it must consider all of the instructions and the state has the ultimate burden of proof. See also Clark v. Arizona, __ U.S. __, 126 S. Ct. 2709, 165 L. Ed 2d 842 (2006).

This Court should grant review in this case because the instructions in this case did not comply with the holdings of Leland v. Oregon and Martin v. Ohio. There were no instructions in this case that the jury must still consider whether Petitioner had the requisite state of mind (as proved by the state

beyond a reasonable doubt), even if the jury found that Petitioner had carried his burden of poof as to insanity.

The evidence of insanity in this case is extensive and not speculative. Six experts (4 for the defense and 2 for the state) testified on the issue of insanity. The instructions in this case relieved the state of its ultimate burden because they did not tell the jury to consider whether the state carried its burden as to mens rea, even if Petitioner failed to carry his burden. This Court should grant certiorari to review this case to give further life to Leland v. Oregon, and Martin v. Ohio. Otherwise the holdings in those cases as well as in Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed 2d 281 (1977) will be meaningless if a state can relieve itself of its burden of proof by shifting a burden of proof of a defense to a Defendant.

CONCLUSION

Wherefore, Petitioner, Derek Pelto, respectfully requests this Honorable Court to grant this petition.

Respectfully submitted,
/s/ James T. Miller

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA FIFTH DISTRICT
JANUARY TERM 2007

DEREK W. PELTO,
Appellant, CASE NO.: 5D05-4272

v.

STATE OF FLORIDA,
Appellee.

_____/

Opinion filed January 23, 2007

Appeal from the Circuit Court
for Orange County,
Lisa T. Munyon, Judge.

James T. Miller, Jacksonville,
for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Wesley Heidt, Assistant
Attorney General, Daytona Beach, for
Appellee.

PER CURIAM.

AFFIRMED. *See Correll v. State*, 523 So.2d 562 (Fla. 1988).

THOMPSON, ORFINGER and TORPY, J.J., concur.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA FIFTH DISTRICT

DEREK W. PELTO,
Appellant, CASE NO.: 5D05-4272

v.

STATE OF FLORIDA,
Appellee.

_____/

DATE: February 28, 2007

BY ORDER OF THE COURT:

Ordered that Appellant's Motion for Rehearing and Clarification, filed February 5, 2007, is denied.

I hereby authorize that the foregoing is
(a true copy of) the original court order.

/s/ Susan Wright
Susan Wright, Clerk

cc: James T. Miller, Esq.
Office of the Attorney General, Daytona Beach

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

APPEAL NO.: 5D05-4272

DEREK PELTO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court for the Ninth Judicial Circuit, Orange County, Florida

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PRELIMINARY STATEMENT

Appellant, Derek Pelto, was the Defendant in the Circuit Court criminal proceedings in the Circuit Court. Appellee, the State of Florida, prosecuted Appellant. References to Appellant will be either Appellant or Defendant. References to Appellee, will be Appellee or the state.

The record on appeal consists of four (4) volumes of record documents, including pleadings, order and a transcript of the sentencing. References to this portion of the record will be R., followed by the appropriate volume and page number. E.g.

(R.II. 100) There are ten (10) volumes of trial transcripts. References to the trial transcripts will be T., followed by the appropriate volume and page number. E.g. (T.II. 100)

STATEMENT OF THE CASE AND FACTS

A. Statement of the case.

A grand jury indicted Appellant for first degree murder. (R.II. 215) This case proceeded to trial. A jury found Appellant guilty of the lesser included offense of second degree murder with a weapon. (R.III. 520-521) The trial court sentenced Appellant to life in prison. (R.III. 598-561, 571) Appellant filed a motion for new trial. (R.III. 525-526) The Circuit Court denied the motion. (R.III. 543a) Appellant timely filed his notice of appeal. (R.III. 591) This appeal then followed.

B. Statement of the facts.

The trial in this case produced the following relevant facts for this appeal.

Daniel Falk was a friend of Sarah Patten, the victim in this case. (T.II. 49) He was her boyfriend for a while. (T.II. 49)

He knew Appellant. (T.II. 50) Patten has moved in with Appellant. (T.II. 51) Falk took Patten's 2 year old daughter and her to Texas - when they returned she went to Appellant. (T.II. 52) Before she went to Appellant, they learned Patten was pregnant (presumably Falk's child). (T.II. 52)

On the day before her death, Patten called Falk and told him to come get her. (T.II. 54) Falk went to Appellant's apartment. (T.II. 54) He saw Patten there; Appellant came home and saw Falk. (T.II. 56) Appellant opened the door and ran and tackled Falk. (T.II. 56) Appellant did not punch Falk. (T.II. 79) Patten and Falk then went outside the apartment and talked. (T.II. 57) Appellant stayed in the apartment. (T.II. 80) The next day, Patten and Falk talked by phone. (T.II. 59) Falk made arrangements to pick up Patten. (T.II. 60) Falk took a friend, Charles Williams, over to the apartment. (T.II. 61)

When Falk got to the apartment, he knocked on the door. (T.II. 63) He could hear Patten crying. (T.II. 63) He heard her say, "she would stay there." (T.II. 63) Counsel

objected on hearsay grounds and that he could confront and cross-examine the statement. (T.II. 63-64) The trial court overruled the objection and found that the statement was not offered for the truth of the matter asserted and it was not testimonial. (T.II. 65)

After Falk heard Patten's statements, he heard grunts, noises, but no words. (T.II. 65) He knocked on the door - then he heard a slam. (T.II. 65) After Patten's statement, Falk then started to walk away; he then heard a crashing sound - like something getting knocked over. (T.II. 66) Falk then yelled "open the door, I'm going to call the police." (T.II. 66) There was no response. (T.II. 67) Falk called downstairs to the manager; she also knocked on the door. (T.II. 69) She took Falk's phone to call the police. (T.II. 70)

Falk testified that Patten had mood swings (not major); in deposition testified that she had major mood swings. (T.II. 75-77) Around the time in question, Falk was taking Prozac. (T.II. 77-78) He did not call 911 on his cell phone. (T.II. 81)

Falk initially left the apartment because he though Patten would not leave with him. (T.II. 84) When he knocked down the door, Falk announced himself. (T.II. 85) Falk heard Appellant say something about his mom. (T.II. 88) He also heard something about a knife. (T.II. 88) He heard yelling and screaming in the apartment. (T.II. 84-89)

Charles Williams is Falk's friend. (T.II. 95) He was at the apartment. (T.II. 95-96) As they got close to Appellant's door, he could hear arguing. (T.II. 99) He heard a male say, "be quiet." (T.II. 99) As Falk knocked on the door, there was a loud boom on the wall. (T.II. 100) Williams then knocked on the door. (T.II. 100) They tried to kick in the door. (T.II. 101) Falk and Williams went downstairs to get the manager - about 15-20 minutes later she went upstairs to open the door. (T.II. 104) She could not. (T.II. 104) While they were at the door, Williams heard Appellant say, "she has a knife in her hand." (T.II. 104) There was more noise inside the apartment - moving around and hitting the walls. (T.II. 105) Later, he heard Patten

moaning. (T.II. 106)

Williams did not hear any noises until after Falk knocked on the door. (T.II. 110) He heard Patten say something but he did not know what it was. (T.II. 111) She was not screaming for help. (T.II. 111) After they knocked, they began to leave. (T.II. 112) Then there was a loud bang on the wall, Williams walked back to the apartment. (T.II. 113) When Williams returned with the manager, he heard more arguing than before. (T.II. 115) He heard "she has a knife." (T.II. 117)

Jason Grandy lived at the apartment complex. (T.II. 124-125) He went with the manager up to Appellant's apartment. (T.II. 127) He heard a male voice in distress saying, "Mom, mom, I am bleeding, all over the place, come here, you got to get here right now." (T.II. 127) He knocked on the door and asked for Appellant. (T.II. 129)

Grandy knew Appellant's voice - the voice he heard that day, he had not heard before - the voice sounded strange. (T.II. 132) The voice said, "Mom, mom, she stabbed me. I am

bleeding all over the place. Get over here now." (T.II. 132)

Carol Dexter worked at the apartment complex. (T.II. 139) She knocked on the door; she heard Appellant say help me and she has a knife. (T.II. 148) She heard Appellant yelling. (T.II. 148)

Carlos Lorenzo is a police officer with the Orlando Police Department (OPD). (T.II. 160) He went to the scene. (T.II. 164) He heard moaning outside the door. (T.II. 165) Officer Jarvis was also there; he knocked on the door - no one answered. (T.II. 166) He heard a male voice saying "please help me." (T.II. 175) Jarvis had obtained a key to the door - he opened it. (T.II. 166) They saw a young lady on her back in a pool of blood. (T.II. 167) There was a knife in her hand. (T.II. 171)

James Reed of the OPD videotaped the scene. (T.II. 179) The tape was played to the jury. (T.II. 182-183) He also photographed the scene. (T.II. 184-189) He also processed the scene for fingerprints and blood; he did not process a hammer

found at the scene for fingerprints. (T.II. 210) He did not collect blood from the hammer. (T.II. 210) He did not collect blood from the knife. (T.II. 210)

Karen Livengood is a crime scene technician with the OPD. (T.III. 237) She helped Officer Read and worked with Sharon Ballou. (T.III. 230) She took some photographs. (T.III. 243-244) She photographed a footprint in blood. (T.III. 252-256) She saw a blood trail in the apartment. (T.III. 260-261) She obtained a partial palm print from the kitchen cabinet door. (T.III. 264-265) She collected 79 blood samples. (T.III. 267) Sharon Ballou is a purported expert on blood spatter. (T.III. 268)

Randy Joslyn is a latent fingerprint examiner with the OPD. (T.III. 284) The palm print he received from Livengood belonged to Appellant. (T.III. 291-292) He opined that a footprint found at the scene belonged to Appellant. (T.III. 292)

Stewart Jarvis is a police officer with the OPD. (T.III. 309) He went to the scene with Officer Lorenzo. (T.III. 309)

At the door to the apartment, he heard moaning. (T.III. 312) Inside, he saw a female lying on the floor. (T.III. 313) She was lying in a pool of blood. (T.III. 313) Appellant was lying on the floor in the living room area. (T.III. 314) There was blood on Appellant's face and arm. (T.III. 315) There was a knife in the female's hand. (T.III. 316)

As they approached the door, Jarvis testified that Lorenzo said, "someone said, please, help me." (T.III. 336) He asked Appellant how he was doing - Appellant said I don't know and lowered himself back down. (T.III. 330) Appellant had a cut in the middle of his forehead. (T.III. 331)

The parties stipulated that the identity of the deceased was Sarah Patten. (T.III. 341) Dr. Sarah Irrgang performed the autopsy in this case. (T.III. 345) Patten was pregnant - first trimester. (T.III. 348) Patten had 11 injuries to the front of her body. (T.III. 348-349) There was a sharp-edge instrument injury to her neck - it was not life threatening. (T.III. 350) Irrgang described the various injuries to the chest. (T.III. 351-

353) There was a 9-12 inch wound to the chest cavity. (T.III. 353) There were injuries to the left arm that appeared to be defense wounds. (T.III. 354) There were also injuries to the back. (T.III. 355-359)

Patten also had injuries to her face and head. (T.III. 375) Something like a hammer inflicted multiple injuries to her face. (T.III. 376) There were 25 to 30 injuries to her face and head. (T.III. 378) The skull was fractured. (T.III. 378) Patten died as a result of the injuries to her head and brain. (T.III. 382)

The cut on the neck was superficial. (T.IV. 394) It was possible that the neck wound was self-inflicted. (T.IV. 396) Most of the wounds on the hands were extremely superficial. (T.IV. 398) The wounds could have been caused from holding a knife, grabbing a knife or having a knife pulled out of a hand. (T.IV. 398)

The parties then stipulated to laboratory analysis of various blood/fingerprint specimens found at the scene. (T.IV. 403-404) The state then rested its case. The trial court denied

a motion for judgment of acquittal (as to the issue of premeditation). (T.IV. 407-414)

The defense presented its case. Judith Pelto is Defendant's mother. (T.IV. 416) On the day in question, she got a call from Appellant. (T.IV. 419) He said, "Mom, mom, you have to come over right away. There's blood everywhere. Please come over and call the police." (T.IV. 419) She did not call the police because she did not realize the severity of the situation. (T.IV. 425)

Brandon Tabaczyaski is a police officer with the OPD. (T.IV. 434) He guarded Appellant at the hospital; he was to listen to what Appellant said. (T.IV. 435) Appellant said, "No one else was there; Sarah cut him. Tell her to get out and she wouldn't leave; Tools on the computer desk." (T.IV. 437)

Leslie-Anna Azunge is a paramedic; she attended to Appellant. (T.IV. 443) She determined, according to the Glasgow Coma Scale that Appellant had a score of 12; he improved to a 13 at the hospital. (T.IV. 447) She described the

scale. (T.IV. 448)

She asked Appellant what happened - he said she would not stop, she wouldn't stop, so I made her. (T.IV. 448) Appellant asked several times (repeatedly) how she was doing. (T.IV. 448) Appellant denied that he lost consciousness. (T.IV. 460)

Detective Joel Wright of the OPD investigated this case. (T.IV. 472) He interviewed Appellant. (T.IV. 476) Appellant said he was attempting to end the relationship with Sarah; she became violent - she used a knife to stab herself and she turned the knife on him. (T.IV. 477) She broke one knife; she got another knife. (T.IV. 477) She got a hammer and hit him with a hammer. (T.IV. 477) He took the hammer away and hit her with the hammer. (T.IV. 447) He took the knife away and struck her with the knife. (T.IV. 477) He said he didn't know how many times he struck her - more than once. (T.IV. 477)

Appellant also said he didn't know how to react when he was attacked; he said I should not have touched her and he

did not want to hurt her. (T.IV. 478) Wright found 2 knives (one broken at the scene) and a hammer. (T.IV. 478) Wright asked that the knives and hammer be processed for fingerprints. (T.IV. 478-479) There was a palm print (belonging to Appellant) on an open drawer that was in a position as if one was closing it. (T.IV. 479) Wright had a photograph taken of Appellant's forehead. (T.IV. 480) He also had photographs taken of Appellant's injuries. (T.IV. 480-486) There were injuries to Appellant's thighs and knees, forehand, eyes, legs, arms and hands. (T.IV. 483-486)

During the interview, Appellant was cooperative and he appeared to understand questions posed to him. (T.IV. 489) During the interview, Wright told Appellant that Patten was dead - he began crying and referred to her as his baby. (T.IV. 498) Appellant said Patten had gotten the two knives before the hammer. (T.IV. 496-498) Over objection, Wright opined that Appellant was saying he acted in self-defense. (T.IV. 499) Appellant did not use the words self-defense - he just said what

happened. (T.IV. 500)

Dr. Michael Gutman is a medical examiner and psychiatrist. (T.IV. 502) The court accepted Dr. Gutman as an expert in forensic psychiatry. (T.IV. 505) He examined Appellant and investigated this case. (T.IV. 508) He examined Appellant's injury to his forehead - a quarter to half dollar indentation, a quarter to half an inch deep. (T.IV. 509) Gutman opined that a severe blow caused the indentation. (T.IV. 511)

Gutman described the effects from such an injury. (T.IV. 513) The injury could cause the flight/fight syndrome - a shot of adrenaline that could make someone act in a storm-like fashion and could cause chaos in the person. (T.IV. 514)

A Glasgow coma scale of 12 indicates a head injury. (T.IV. 515) A severe blow would have rendered Appellant into an altered state of consciousness. (T.IV. 516) Appellant's past history indicates he was a passive person, he was not inclined towards violence. (T.IV. 525)

Dr. Gutman opined that Appellant was a passive person;

he was spineless and jelly fish like. (T.IV. 527) As a result of the events and the injury, Appellant was in a dissociative delirium. (T.IV. 527) Gutman opined that at the time of the offense, Appellant was insane or lacked criminal responsibilities for his actions. (T.IV. 528)

Appellant had a fracture of the frontal wall of the sinus. (T.IV. 522) Gutman opined that he did not believe a person could hit themselves (sic) between the eyes with a hammer sufficiently hard enough to fracture their skull. (T.IV. 587)

Dr. Michael Gebel is a doctor in neurology. (T.IV. 588-589) The trial court accepted him as an expert witness in neurology and brain injury. (T.V. 590) He examined Appellant's forehead. (T.V. 590) He opined that the blow which caused the injury was substantial - like a hammer. (T.V. 592) Gebel described how the injury would have effected the brain. (T.V. 593) A person with a skull fracture would have obtunded consciousness - state of consciousness altered severely. (T.V. 595) The person might not be aware of what

was going on. (T.V. 595) Gebel opined that someone, unless they were psychotic or on PCP, could not hit themselves with a hammer so as to fracture the skull. (T.V. 596) Gebel also opined that a person who received the type of blow to the head like Appellant would have at the least, altered sensorium, a concussion. (T.V. 607) Such a person would not fully know what was going on about them. (T.V. 608)

William Anderson is a doctor and he practices forensic pathology. (T.V. 612 he is a former medical examiner. (T.V. 614) The court accepted Anderson as an expert in forensic pathology. (T.V. 616) He reviewed the autopsy report of Doctor Irrgang. (T.V. 617) The injuries to the back and some of the chest injuries were superficial - this was unusual. (T.V. 623) Dr. Anderson described victim's injuries in detail. (T.V. 627-632) Usually, there are no superficial wounds from an attack. (T.V. 628-629) In this case there was a discrepancy between severe, deep wounds and superficial wounds. (T.V. 628-629) Anderson opined some of the wounds could have

been self-inflicted. (T.V. 629) Anderson could not tell based upon the autopsy whether some of the other wounds were self-inflicted. (T.V. 632)

Anderson opined that the injury to Appellant's head was not self-inflicted. (T.V. 633-634) Appellant had defensive wounds. (T.V. 637, 640) The wound to the victim's neck could have been self-inflicted. (T.V. 639-640)

Dr. Elkhonon Goldberg is a neuropsychologist. (T.VI. 679) The Court accepted Dr. Goldberg as an expert in neuropsychology. (T.VI. 682) He explained how the brain functions. (T.VI. 684-698) Damage to the prefrontal cortex (frontal lobe) usually produces an inability to plan one's actions - inability to anticipate the consequences of one's actions. (T.VI. 697) Damage to the frontal lobe is like a non-surgical lobotomy. (T.VI. 700)

Goldberg examined Appellant. (T.VI. 700) Based upon Appellant's head injury, he would have brain damage, particularly to the frontal lobe. (T.VI. 701) Right after

Appellant's injury, his Glasgow coma scale probably would have been lower than 12. (T.VI. 702) The ability to answer simple questions would not be impaired - the injured person would appear to be lucid. (T.VI. 704) However, the person would not be able to control their actions. (T.VI. 706)

Goldberg gave Appellant a battery of neuropsychological tests. (T.VI. 706-709) Based upon these tests, Goldberg opined there was strong evidence of brain damage. (T.VI. 709-710) Appellant's disjointed and ungrammatical speech right after the injury was evidence of brain damage. (T.VI. 713) The obstruction of pupil dilation was also evidence of brain injury. (T.VI. 713)

Goldberg opined that Appellant was not capable of rational activity, he would not know right from wrong. (T.VI. 713) He could not control his activity. (T.VI. 714) Based upon the psychological tests given to Appellant, his condition had to be much more impaired at the time of the injury (the brain heals itself over time). (T.VI. 709-710)

Dr. Jeffrey Danziger is a psychiatrist. (T.VI. 781) The Court accepted him as an expert in forensic psychiatry. (T.VI. 786) He interviewed Appellant and reviewed the records in this case. (T.VI. 787-788) Danziger noted that rescue personnel found Appellant unconscious; Appellant's eyes were fixed and deviated to the center. (T.VI. 794) This indicated something was wrong with the brain. (T.VI. 794) He also noted the Glasgow coma scale score. (T.VI. 794) The CT scan indicated a skull fracture. (T.VI. 797)

Danziger found no evidence of malingering or exaggeration. (T.VI. 808) At the time of the offense, Appellant was suffering from a delirium, due to the head injury. (T.VI. 808) Danziger opined that Appellant was insane at the time of the offense. (T.VI. 811) Appellant was not able to control his actions and he could tell right from wrong. (T.VI. 812) After Danziger's testimony, the defense rested its case. (T.VI. 864) The Court denied a motion for judgment of acquittal. (T.VI. 864-865)

The state then presented rebuttal witnesses. Carlos Tavarez is a paramedic. (T.VI. 866) He went to the scene. (T.VI. 867) He examined Appellant; he was not unconscious. (T.VI. 870) Appellant responded to painful stimuli. (T.VI. 870) Arthur Gatlin, a paramedic also testified about the initial treatment of Appellant. (T.VII. 876-878) Appellant was not responsive to verbal stimuli. (T.VII. 878) Appellant reacted to a painful stimuli - a sternum rub. (T.VII. 878) Appellant appeared to be oriented and his pupils were equal and reactive to light. (T.VII. 880) Appellant had no signs of being delirious. (T.VII. 882)

Gatlin was not a doctor, psychiatrist nor neurologist. (T.VII. 883) He did not know Appellant had a fractured skull. (T.VII. 883-884) The sternum rub means putting the knuckles on the sternum and grinding it. (T.VII. 885)

The state then called Dr. Alan Barns, a psychiatrist, as a rebuttal witness. (T.VII. 888) The court accepted him as an expert in forensic psychiatry. (T.VII. 891) The Court appointed

him to do an evaluation of Appellant. He examined Appellant. (T.VII. 894) He opined that Appellant did not suffer from any mental infirmity, disease or defect at the time of the offense. (T.VII. 900) Appellant was not in a delirium. (T.VII. 901) He opined that he believed Appellant knew what he was doing - he was in a rage. (T.VII. 901) Barns testified he believed Appellant knew he was wrong. (T.VII. 901)

Dr. Daniel Tressler is a psychologist. (T.VII. 908) The Court accepted him as an expert in forensic psychology. (T.VII. 911) He evaluated Appellant. (T.VII. 912) He did not find evidence of insanity, based upon the statements made by Appellant to him, and to the police and paramedics. (T.VII. 921) Appellant did suffer a brain injury that led to a decline in a higher level of functioning. (T.VII. 924)

The state then called Sharon Ballou as a witness (blood spatter/stain expert). (T.VII. 938) Appellant objected that she was not a rebuttal witness. (T.VII. 938) The state argued Ballou could rebut Appellant's version of events. (T.VII. 939) The

Court found that the evidence would be proper. (T.VII. 939-940) Appellant objected to rebuttal testimony by a radiologist - all of the witnesses agreed that Appellant had a skull fracture. (T.VII. 945) The trial court overruled the objection. (T.VII. 948)

Dr. Robert Hudak is a radiologist. (T.VIII. 950) The Court accepted him as an expert in radiology. (T.VIII. 951) He reviewed the CAT scan of Appellant. (T.VIII. 953) The brain appeared normal. (T.VIII. 954) He described the fracture. (T.VIII. 955-956) Hudak was not a neurologist; he could not tell if there had been interruption of frontal lobe functions. (T.VIII. 956)

Sharon Ballou then testified. Appellant renewed his objection to her testimony without a Frye hearing. (T.VIII. 948) Ballou is a self-employed forensic consultant. (T.VIII. 960) She previously worked with the Seminole County Sheriff's Office. (T.VIII. 960-961) She also worked for Florida Department of Law Enforcement (FDLE). (T.VIII. 961-963) She trained under

Leroy Parker, a recognized expert in the area of bloodstain pattern reconstruction. (T.VIII. 962-964) She has testified as to bloodstain pattern reconstruction 4 to 5 times. (T.VIII. 964) Her training was a one week course. (T.VIII. 965) She is not certified as a bloodstain patterned analyst. There is no degree for the field. (T.VIII. 965) Appellant objected to the acceptance of Ballou as an expert. (T.VIII. 965-966)

Ballou then explained bloodstain pattern analysis. (T.VIII. 966-976) She went to the scene - a crime scene technician called her. (T.VIII. 980) Ballou then described the location and possible origin of the various blood stains. (T.VIII. 989-1020) Ballou then offered a reconstruction of the sequence of events - it appeared that the incident began in the hallway. (T.VIII. 1020) It appears most likely that the victim was at the doorway when she was struck. (T.VIII. 1021) There was a large amount of dropped blood on a chair. (T.VIII. 1023) There was a contact stain on the chair. (T.VIII. 1024) Appellant's blood was on the chair. (T.VIII. 1024) Ballou testified that

Appellant's version of events was not consistent with her findings. (T.VIII. 1026)

Only 11 of the 79 blood samples were actually tested. (T.VIII. 1031) There was no blood test to establish whose blood was in the fingerprints. (T.VIII. 1032) Ballou couldn't say whose blood was on the door. (T.VIII. 1033) She could not tell whose blood was in a handprint. (T.VIII. 1034) Appellant's shirt was not examined. (T.VIII. 1035) No one checked to see how much of Appellant's blood was on the victim's clothing. (T.VIII. 1035) Appellant's blood was identified on the left arm of the green chair and in three parts of a blood trail in the living room. (T.VIII. 1036)

Other blood on the chair was not examined. (T.VIII. 1038) Ballou could not tell where Appellant was going when he left blood at a spot. (T.VIII. 1040)

Ballou was unable to locate the bloodstain that indicated where Appellant got hit in the head with a hammer. (T.VIII. 1046-1047) The blood at the entrance to the bathroom was not

tested. (T.VIII. 1052) There was no test of a bloody footprint in the bathroom. (T.VIII. 1052) Blood samples off the wall were not tested. (T.VIII. 1055) Blood from a towel was not tested. (T.VIII. 1055) There was tissue and hair under a kitchen counter that were not tested. (T.VIII. 1056-1057) The blood spatter on the door was not tested. (T.VIII. 1060)

There were numerous other blood stains that were not tested. (T.VIII. 1062-1069) Ballou could not tell where Appellant got hit in the head or got cut. (T.VIII. 1070-1071) Ballou testified that her reconstruction was based upon scientific principles. (T.VIII. 1070)

Ballou testified that her findings were consistent with a chase of Patten to the door. (T.VIII. 1077); consistent with a beating at the door or in the foyer. (T.VIII. 1077); possibly consistent withe a person going to a knife drawer and getting a knife; consistent with stabbing a person on the floor; consistent with a knife in a downward trajectory. (T.VIII. 1077-1080) The state also asked if the blood trail was consistent with someone

going back over to Patten and placing a knife in her hand. (T.VIII. 1080) Ballou could not tell how long the events took. (T.VIII. 1081-1082) She opined that the scene was not a chaotic scene - it was a progressive scene. (T.VIII. 1081-1082)

The Circuit Court then held a jury instruction conference. As to the issue of insanity, Appellant requested the correct standard jury instruction. (T.VIII. 1097) Appellant noted that the standard jury instruction on insanity (no. 3.6(a)) was still in effect; the Florida Supreme Court had not yet adopted an instruction that incorporated the new statute on insanity which gave Defendant the burden to prove insanity by clear and convincing evidence. (T.VIII. 1098) Appellant also argued that the instruction was confusing and an incorrect statement of the law. (T.VIII. 1098)

Appellant further argued and cited cases for the proposition that the "clear and convincing" evidence was a burden less than a reasonable doubt (it has been applied only in civil proceedings). (T.VIII. 1101-1103) Appellant also argued

that the clear and convincing standard related to the nature of the witnesses' testimony, not its impact upon the jury. (T.VIII. 1104)

The trial court overruled Appellant's request and objection. (T.VIII. 1107-1108) The Court decided to give the definition of clear and convincing as used in Jimmy Ryce cases. (T.VIII. 1108) Appellant asked the Court to add the words that clear and convincing was more than a preponderance but less than proof beyond a reasonable doubt. (T.VIII. 1108) The trial court declined to add these words. (T.VIII. 1109)

After closing arguments, the trial court instructed the jury on insanity; the Court instructed the jury that Appellant had the burden to prove insanity by clear and convincing evidence. (T.IX. 1171) Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue. (T.IX. 1171)

During jury deliberations, the jury posed a question: can

we view the phone records about the call to Appellant's mother. (T.X. 1193) The jury also asked for the 911 tape. (T.X. 1191) The Court gave the jury a tape player. (T.X. 1193) There were more questions that the Court answered (about the premeditation instruction). (T.X. 1194-1195) The jury then returned a guilty verdict as to second degree murder with a weapon. (T.X. 1197)

SUMMARY OF ARGUMENT

The issue in this case is a case of first impression in Florida. The Circuit Court deprived Appellant of a fair trial when it instructed the jury that he had the burden to prove insanity by clear and convincing evidence. The court defined clear and convincing evidence as evidence which was precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction without hesitation. The Court gave the instruction pursuant to a State statute, Section 775.027, Florida Statutes.

This instruction was erroneous for four reasons: 1) the

Florida Supreme Court has not adopted the instruction delineated in Section 775.027. The burden of proof is a procedural matter; only the Florida Supreme Court may promulgate such instructions; 2) the instruction deprived Appellant of his constitutional right to have the state prove all of the elements of a crime beyond a reasonable doubt. Although the state may shift the burden of a defense like insanity to the Defendant, the state may not do it in such a way as to relieve the state of its burden of proof. The instruction given in this case relieved the state of its burden. The instruction in this case violated Appellant's due process rights under the United States and Florida Constitutions; 3) the comment is confusing and misleading. Given the common definitions of phrases like precise and explicit, the instruction was misleading and confusing in light of the other instructions, especially the instruction on reasonable doubt. The instruction actually comments more on the manner and style of the witness's testimony, instead of the burden of proof; 4) the

instruction was an impermissible comment on the evidence because it told the jury that it could not accept the defense evidence unless the witnesses testified in a certain way. The error in this case was prejudicial. Appellant represented the testimony of five (5) experts who opined that Appellant was insane. The state presented their rebuttal expert witness. Insanity was the determinative issue in this case. This Court should remand for a new trial based upon this issue.

The trial court also erroneously admitted testimony from a blood spatter (stain expert). Appellant requested a Frye hearing. Although the state expert said she used scientific theories/techniques, she never said what they were. There was no proof in this case that the techniques/theories used were scientifically valid or were generally accepted. No Florida Court has determined that the type of scientific evidence used in this case meets the Frye test (test for **new** scientific evidence or a **novel** application of scientific evidence). Her testimony

was crucial because it rebutted Appellant's version of events which the defense experts used to determine that he was insane. This Court should remand for a new trial based upon this issue.

I.

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRIAL: THE COURT INSTRUCTED THE JURY THAT HE HAD THE BURDEN TO PROVE INSANITY BY CLEAR AND CONVINCING EVIDENCE - THE DEFINITION OF CLEAR AND CONVINCING WAS: 1) A COMMENT ON THE EVIDENCE; 2) CONFUSING AND MISLEADING; 3) DEPRIVED APPELLANT OF THE REASONABLE DOUBT STANDARD OF PROOF; AND 4) IS A PROCEDURAL MATTER NOT ADOPTED BY THE FLORIDA SUPREME COURT AS A RULE OF PROCEDURE.

(A) Standard of review.

The abuse of discretion applies generally to the giving of a jury instruction. See Worley v. State, 848 So.2d 491 (Fla. 5th DCA 2003). However, this case also involves de novo questions of law because it involves questions of constitutional law. See State v. Nichols, 892 So.2d 1221 (Fla. 1st DCA 2005); Connor v. State, 803 So.2d 598 (Fla. 2001).

(B) Preservation of issues raised in this case.

To the extent that trial counsel did not preserve any of the arguments made in this issue, Appellant raises them as fundamental error. Florida courts have held that the improper definition of a crime (or a defense) is fundamental error because the improper instruction may have led the jury to convict erroneously. See Bruce v. State, 879 So.2d 686 (Fla. 4th DCA 2004) (erroneous instruction as to element of offense was fundamental error); Reed v. State, 837 So.2d 366 (Fla. 2002) (fundamental error where trial court incorrectly defined an essential element of an offense); Tatum v. State, 857 So.2d 331 (Fla. 2d DCA 2003) (special instruction on a presumption was fundamental error).

A fundamental error as to a jury instruction is an error that is pertinent or material to what the jury must consider to convict and if the error amounts to a denial of due process. Martinez v. State, 31 Fla. Law Weekly D1299 (Fla. 3d DCA May 10, 2006); Petrucelli v. State, 855 So.2d 150 (Fla. 2d DCA 2003) (fundamental error is one that undermines the confidence

in the trial outcome and goes to the very foundation of a case ... it is the equivalent to a denial of due process).

The jury instruction on insanity went to the foundation of the case - the issue in this case was insanity - a fundamental issue is one that is relevant and material - an issue the jury had to decide in this case. Appellant represented several experts on the issue of insanity. The state presented rebuttal experts to the defense experts. Consequently, the jury instruction on the burden of proof (and its definition) on insanity went to the foundation of the case. If that instruction was erroneous and deprived Appellant of the reasonable doubt, then the error was fundamental because it deprived Appellant of due process; the error also undermines confidence in the result (rejection of the insanity defense). Consequently, the error in this case was fundamental regardless of which of the various formulations of the fundamental error test that this Court would apply to this case.

(C) Merits.

1. The Florida Supreme Court has not adopted the instruction on insanity pursuant to Section 775.027, Florida Statutes (2001): the instruction is purely a procedural matter.

Defense counsel did object to the giving of the clear and convincing burden of proof for Appellant on the grounds that the Florida Supreme Court had not yet adopted it into the standard jury instruction. This issue is currently pending before the Florida Supreme Court in Case No.: SC05-1622. The Committee on Standard Jury Instruction Criminal Cases has proposed a jury instruction similar to the one given in this case. The Supreme Court may not adopt the instruction, apart from other constitutional defects, because the instruction is purely a procedural matter. The Florida Association of Criminal Defense Lawyers (FACDL) has filed comments which ask the Court to **not** adopt the instructions.

In State ex. rel. Boyd v. Green, 355 So.2d 789 (Fla.

1978), the Supreme Court invalidated a state statute which provided for a bifurcated trial procedure on the issue of insanity and guilt or innocence (two separate trials). Justice England in a concurring opinion wrote that it is constitutional responsibility of the Courts alone to preserve the course, form, manner, means, method, mode, order, process or steps by which the substantive elements of a crime are presented in criminal proceedings. 355 So.2d at 795 See also In Re: Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972) (Adkins, J., concurring)

In Shaps v. Provident Life & Accident Ins. Co., 826 So.2d 250 (Fla. 2002), the Supreme Court held that the burden of proof in a particular proceeding is a procedural matter. See also Amendments to Florida Rules of Criminal Procedure and Appellate Procedure, 875 So.2d 563 (Fla. 2004), the Court did not adopt the clear and convincing burden of proof of mental retardation in a death penalty case. Justice Pariente suggested that the Court wait for a case in controversy to decide the issue

of the burden of proof.

If the instruction is purely a procedural matter, then the Court does not have to adopt it, even though the Legislature passed the statute in 2001. As trial counsel pointed out, although this section has been in effect since 2001, the Florida Supreme Court has to date continued to adopt the prior insanity instruction.

This Court should find that because the issue of how the jury reasons a burden of proof is a procedural matter, only the Supreme Court can enact such a rule. At the time of Appellant's trial, the Florida Supreme Court had not yet adopted an instruction like the instruction given in this case. Therefore, the trial court should not have given an instruction pursuant to the statute. At the least, this Court should defer any ruling on the issues presented until the Florida Supreme Court decides when to adopt the proposed jury instruction.

2. The clear and convincing evidence instruction in this case deprived Appellant of his Sixth

Amendment and Due Process Rights under the United States and Florida Constitution.

Even if the state may allocate the burden of proof of insanity to a Defendant, the state may not allocate the burden in such a way so as to relieve the state of its burden to prove each and every essential element of a crime beyond a reasonable doubt. See Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed 2d 508 (1975); Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed 2d 267 (1987).

Appellant has a due process right to have the state prove each element, including intent and state of mind, beyond a reasonable doubt - the clear and convincing standard negated any attempt by Appellant to establish a reasonable doubt about Appellant's state of mind.

In the trial of this case, the trial court decided to give the definition of "clear and convincing" used in Jimmy Ryce proceedings. The Florida Supreme Court has decided that Jimmy Ryce proceedings are civil. Mitchell v. State, 30 Fla.

Law Weekly S618 (Fla. Sup. Ct. September 8, 2005) In such proceedings, the **State** must prove by clear and convincing evidence that a person meets the criteria for commitment. Of course, the usual burden of proof in a civil case is preponderance of the evidence. Therefore, the burden of proof in Jimmy Ryce cases is actually a **higher** burden of proof than preponderance. See Standard Jury Instructions in Criminal Cases, 777 So.2d 366 (Fla. 2000) (the Supreme Court rejected arguments that the clear and convincing evidence standard was equal to or higher than the beyond a reasonable doubt standard).

An analogy to Jimmy Ryce cases for this case is a faulty analogy. This case is criminal, not civil. The clear and convincing burden is now on the Defendant (if this court finds that the statute properly placed the burden on Appellant) to prove insanity. As Appellant will argue below, this fact denies Appellant of due process.

Even if the state may shift the burden as to insanity to

the defense, the state must still prove intent/state of mind beyond a reasonable doubt. See Holiday v. State, 753 So.2d 1264 (Fla. 2000). In Leland v. Oregon, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed 302 (1952), the Supreme Court held that the state may require the Defendant to establish insanity by clear and convincing evidence. However, the Court in Leland v. Oregon noted that in Oregon the jury was instructed that the state still had to prove intent beyond a reasonable doubt even if a Defendant raised (but did not prove) insanity. The Oregon Courts required the jury to consider the issue of the state of mind of the Defendant even if the Defendant did not carry his burden as to insanity. Unlike this case, the Oregon instructions ensured that the jury would understand that it must find sufficient proof of mens rea, even if the Defendant failed to prove he lacked mens rea. The Oregon procedure required the jury to consider **all** of the evidence about state of mind. In Martin v. Ohio, *supra*, the Supreme Court held that the state

could shift the burden of self-defense to the Defendant so long as the instructions told the jury that it must consider all of the evidence and the state still has the ultimate burden of proof. The instructions in this case did not comply with the requirements of Leland v. Oregon and Martin v. Ohio.

In Holiday v. State, *supra*, the Florida Supreme Court discussed the issue of fundamental error (Holiday was a case about entrapment) as to the decision in Yohn v. State, 476 So.2d 123 (Fla. 1985). In Yohn, the Court held that the state could place the burden of proof of insanity on the Defendant - under Yohn, if there was evidence of insanity sufficient to present a reasonable doubt of sanity, then the presumption of sanity vanishes and the state must prove beyond a reasonable doubt that the Defendant was sane. Holiday v. State, 753 So.2d at 1269

Although Yohn and Holiday did not directly address the issue raised in this case, they both hold that although the state may allocate the burden of proof of insanity to the Defendant,

the state may not in such a way as to diminish or remove the reasonable doubt standard. Therefore, the **only** constitutional way the state may allocate the burden of proof of insanity to a Defendant is to require a Defendant to raise and prove the defense and raise a reasonable doubt about the Defendant's requisite state of mind at the time of the offense. Otherwise, any higher burden of proof will relieve the state of its responsibility to prove a case beyond a reasonable doubt. As Justice Mitchell wrote in Hodge v. State, 26 Fla. 11.7 So. 593 (Fla. 1890),

> "the subject of insanity has given the courts much trouble. It is a subject upon which scientific experts - men who have made the subject a lifetime study - differ widely in the conclusions they arrive at, from the actions of persons, as to whether they are sane or insane. One set of such experts, after hearing all the evidence in a case, will give it their opinion that a certain person is insane, while another set, of equal respectability and skill, will give it as their opinion that the person is sane. To require the defense of insanity to be proved beyond a reasonable doubt is an impossibility." 7 So. at 596.

The clear and convincing standard is almost, or some would say equal to, as stringent as the reasonable doubt standard. In this case, the "clear and convincing" instruction permitted the jury not to have a reasonable doubt about Appellant's state of mind, but to require Appellant to show that he was insane to the point that the jury could say he was insane by a firm belief or conviction, without hesitation. If this standard is not proof beyond a reasonable doubt, it is logically the burden of proof next highest to proof beyond a reasonable doubt. See Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed 2d 498 (1996) (clear and convincing proof of incompetence to stand trial is unconstitutional given the interests of the Defendant weighed against the interests of the Defendant).

Appellant suggests that there is a way to interpret the clear and convincing statute on insanity to make it constitutional. As long as the instruction would advise the jury that it should acquit in the Defendant raises a reasonable doubt

about his requisite state of mind, the instruction could require that the evidence of insanity be precise and explicit and not confusing (as opposed to speculation and not based upon speculative non-expert testimony). (Of course, Appellant realizes that he has argued that such instructions are a comment on the evidence. Appellant does not abandon that argument but he offers this argument as an alternative if this Court rejects this argument.)

Given the balancing test discussed in Cooper v. Oklahoma, the Defendant's liberty interest in achieving an acquittal is great (by the creation of a reasonable doubt): the state's only legitimate interest is that any proof of insanity be admissible and not speculative. Appellant understands that a jury may decide insanity on lay testimony as opposed to expert testimony. See Hansen v. State, 585 So.2d 1056 (Fla. 1st DCA 1991); State v. Van Horn, 528 So.2d 529 (Fla. 2d DCA 1988). However, lay witnesses may testify about their observations; they cannot give opinion on mental diseases/defects. See

Calandra v. State, 727 So.2d 1028 (Fla. 4th DCA 1999); Preston v. State, 444 So.2d 939 (Fla. 1984).

Appellant is merely suggesting that given the vagaries of any insanity defense, the state may have a legitimate intent in ensuring that the evidence is not speculative. However, any such interest must not infringe upon the proof beyond a doubt standard of the Sixth and Fourteenth Amendments to the United States Constitution. Article I, Section 9 of the Florida Constitution also requires proof of all essential elements of a crime beyond a reasonable doubt. Wright v. State, 30 Fla. Law Weekly D1495 (Fla. 4th DCA 2005); State v. Cohen, 568 So.2d 49 (Fla. 1990). For all of the reasons discussed in this issue, the clear and convincing jury instruction violated Article I, Section 9 of the Florida Constitution.

The United States Supreme Court in Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed 2d 281 (1977), held that although the state could require a Defendant to have the burden of proof for an affirmative defense (proof of fact that

mitigates punishment); the state could not label proof as an affirmative defense so as to relieve the state from proof of an essential element. In Patterson, the issue was whether the state could require the Defendant to prove he acted under extreme emotional disturbance so as to reduce a charge from murder to manslaughter; the New York second degree murder statute defined murder as an act done with intent to cause the death of another person and the act causes such death. The Patterson court stated that such burden shifting could go too far but the state may require the Defendant to have the burden of proof as to matters of excuse or explanation. 437 U.S. at 203.

In Patterson v. New York, *supra*, the court noted that in Leland v. Oregon, *supra*, the Oregon court required the jury to first consider whether was proof beyond a reasonable doubt on all essential elements (including insanity) and then the jury could consider the Defendant's defense of insanity (Defendant has burden of proof beyond a reasonable doubt). 432 U.S. at 204. The Patterson court also discussed the issue of whether

Leland v. Oregon, *supra*, was still viable in light of In Re: Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed 2d 368 (1970); Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed 2d 508 (1975).

Patterson v. New York and Leland v. Oregon did not address the question in this case. In this case, the issue of insanity did not go to a claim of excuse or explanation (as to emotional disturbance like in Patterson v. New York); the issue in this case was not a consideration of insanity **after** an instruction to find proof beyond a reasonable doubt on all essential elements (like mens rea) before a consideration of a defense of insanity. In this case, pursuant to Section 775.027, Florida Statutes the court instructed the jury that Appellant was **presumed** sane and Appellant would have to establish by clear and convincing evidence that he was not sane.

Mens rea as to proof of premeditated murder has always been an essential element of the state's proof. See Yohn v.

State, 476 So.2d 123 (Fla. 1985). The prior Florida scheme was that a person was presumed sane but once a Defendant adduced sufficient evidence to raise a doubt about the resumption, then the state had to prove sanity beyond a reasonable doubt. See also Hodge v. State, 26 Fla. 11, 7 So. 593 (1890); Davis v. State, 44 Fla. 32, 32 So. 822 (1902); Corbin v. State, 129 Fla. 421, 176 So. 435 (1937); Anderson v. State, 276 So.2d 17 (Fla. 1973). In State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982), the Fifth District Court of Appeal discussed the common law requirement of mens rea as to mala in se crimes (like murder) although the Legislature may be able to dispense with mens rea as to crimes mala prohibita, the Legislature may not dispense with proof of mens rea as to murder (the Legislature has not done so anyway). Therefore, proof of mens rea is still an essential element of first degree murder.

Section 775.027 violates due process as discussed in Patterson v. New York and the common law about mala in se crimes because it relieves the state from its burden of proof as

to an essential element because even if the state could transfer the burden of proof to Defendant, the clear and convincing evidence standard could result in a conviction even if a Defendant raised a reasonable doubt about an essential element (mens rea). By definition, the clear and convincing evidence standard is proof which is greater than mere proof which raises a reasonable doubt. As defined to the jury in this case, Defendant's burden was to establish proof that was precise and explicit; it must be of such weight that it produces in your mind a firm conviction or unbelief.

The clear and convincing standard is logically greater than proof which would merely **raise** a reasonable doubt as opposed to the state's burden proof which would must be proof **beyond** a reasonable doubt - under the prior Florida law on insanity, the Defendant had only to raise a reasonable doubt as to sanity and the state then had to exclude all doubts about sanity. The clear and convincing standard is manifestly greater

than the mere raising of a doubt because it requires proof of such a weight as to produce a firm conviction - this could logically be proof beyond a reasonable doubt because a jury could reasonably believe that one could hold a firm conviction as to an issue only if there was no reasonable doubt about it. A firm conviction is simply more proof than proof which only raises a doubt. Moreover, the clear and convincing evidence standard also requires proof that is precise and explicit - a reasonable doubt may exist from the lack of evidence or evidence which is, by its very nature, not precise or explicit. Evidence which is equivocal or ambiguous may establish a reasonable doubt precisely because it is ambiguous or equivocal. This requirement alone establishes a greater standard of proof than proof which raises a reasonable doubt.

Section 775.027 denies due process because it shifts proof of an essential element to the Defendant. 775.027 does not merely shift proof of a claim of excuse or explanation - proof of a lack of mens rea is not proof of excuse or explanation

- it is proof of the essential element that one did the act with the requisite state of mind. The statute in Patterson v. New York, is illustrative of this point. In Patterson, the Defendant did not claim that he did not shoot the victim with the intent to cause death. In Patterson, the Defendant claimed that although I intended to act, I did so under extreme emotional disturbance (a classic case of excuse or explanation).

In this case, Appellant raised the issue that I did not legaliy intend the acts because I was insane - did not understand the consequences of the acts and that the act was wrong. Proof of lack of mens rea by insanity is proof that I did not know and understand what I was doing; a claim of excuse/explanation is that I knew what I was doing **but** I did the act because of .... (emotional disturbance, intoxication or self-defense).

Patterson v. New York, held that a state could **not** shift the proof of an essential element (like mens rea) to the Defendant by defining it as an affirmative defense. In this case,

the instructions to the jury shifted the entire burden to Appellant. The clear and convincing evidence burden was unconstitutional because it deprived Appellant of his constitutional guarantee under the Federal and Florida Constitutions that the state must prove all essential elements beyond a reasonable doubt. See In Re: Winship, *supra*; McDuffee v. State, 55 Fla. 125, 46 So. 721 (1908); Thompson v. State, 887 So.2d 1260 (Fla. 2004); Fiore v. White, 531 U.S. 225, 121 S. Ct. 712, 148 L. Ed 2d 629 (2001).

As required by Section 775.027, a Defendant has the burden of proof of insanity. 775.027 on its face does not eliminate the reasonable doubt standard. However, the use of phrases like evidence which is precise and explicit may dilute the reasonable doubt standard. Evidence which is incapable of being precise and/or explicit may create, by definition, a reasonable doubt. In the context of an insanity defense and the use of psychiatric testimony, the evidence of insanity by definition, may not be explicit or precise. A psychiatric opinion

given to a reasonable degree of medical certainty would not necessary be explicit or precise. An expert opinion which stated certain actions could possibly have a certain meaning (or meanings) would not be precise or explicit. The logical import of phrases like precise and explicit is to operate to exclude circumstantial proof or proof which is indirect; proof that is not explicit or precise. Although the clear and convincing standard (as defined in this case) may be appropriate in a civil proceeding, it is improper and denies due process in a criminal setting because it defines proof in a way that may exclude an otherwise reasonable doubt.

3. The definition of clear and convincing was a comment upon the evidence.

The instruction that the proof must be precise and explicit is a comment on the evidence. Such an instruction is a judicial comment on the evidence became it told the jury that the Defendant could prevail only if his evidence of insanity was precise and explicit (without confusion). See Fenelon v. State,

594 So.2d 295 (Fla. 1997); Fecske v. State, 757 So.2d 548 (Fla. 4th DCA 2000), rev. den., 776 So.2d 276 (Fla. 2000); Richardson v. State, 617 So.2d 801 (Fla. 2d DCA 1993). A jury should may have to accept evidence which is imprecise and not explicit (circumstantial and inferential) - the instruction amounts to a judicial comment. Even if this phrase is proper, the phrases explicit and precise are judicial comments for the reason stated above - the court is commenting that only precise and explicit evidence is sufficient. The instructions may tell the jury that it must find a firm conviction or belief because this would relate to a **burden** and **weight** of proof, not how the witnesses testified.

4. The definition of clear and convincing was confusing and misleading in light of the State's burden to establish proof including on the element of intent beyond a reasonable doubt of Appellant's guilt.

Unlike the burden of proof in civil cases or Jimmy Ryce cases, there were **two** burdens of proof in this case - the burden of the state to prove Appellant's guilt beyond a reasonable doubt, including the element that he had a premeditated intent and design to kill the victim and/or a depraved mind for second degree murder (the jury found Appellant guilty of the lesser included offense of second degree murder). Therefore, the question arises as to whether the clear and convincing instruction misled or confused the jury on the issue of whether the state had to prove all of the elements of the offense, including state of mind.

The trial court instructed the jury that clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without Legislation, about the matter in issue. The phrases **precise, explicit** and lacking in confusion are misleading and confusing in the context of a criminal trial. As

noted by trial counsel, these terms refer to **how** a witness testified or how the defense presented evidence.

In the context of insanity, the terms are misleading. By its very nature, testimony and evidence about insanity may not be **precise, explicit** or lacking in confusion. By its very nature, evidence of insanity may be indirect and inferential. By its very nature, evidence of insanity may be (and most times **cannot** be) explicit - it must be indirect. See Hodge v. State, *supra*. By its very nature, expert testimony on insanity may not be precise - most experts testify that their opinions derive from a range of probabilities/possibilities. E.g. "It is my opinion within a degree of reasonable medical certainty that the Defendant was insane." The experts in this case based such opinions on **inferences** from all of the available facts.

In the context of this case the phrases precise and explicit were misleading and confusing because there were no eyewitnesses to the offense. **Both** sides had to use

circumstantial and inferential evidence to establish proof. E.g., the state used a blood spatter expert to **infer** certain facts. Even if one argues that any witness must give precise testimony (that is lacking in confusion and not so vague so as to prevent to trier of fact from reaching a conclusion based upon that testimony), the phrase **explicit** is confusing/misleading in this context.

The common definition of **explicit** is direct and obvious (fully revealed or expressed) without any need to infer or to consider other circumstances to arrive at a conclusion or opinion. See Merriam-Webster Online Dictionary, http://www.M-W.com/dictionary/explicit. Given the common definition and understanding of the phrase explicit, the jury in this case may have rejected Appellant's defense because the nature of psychiatric, neurological and medical testimony about insanity may prevent **explicit** testimony about it.

One of Appellant's experts, Dr. Goldberg testified that an individual **could** have frontal lobe damage and **still appear**

to be normal - such a person **may** be able to answer questions posed to them. However, one **could** still have frontal lobe damage that would cause one to act, without control or knowledge, in inappropriate ways. The use of the phrase explicit in this case may have caused the jury to reject Dr. Goldberg's testimony. In the context of Jimmy Ryce cases and civil cases, the use of explicit does not mean that a jury may not consider inferential or circumstantial evidence.

II.

THE TRIAL COURT ERRED WHEN IT REFUSED TO CONDUCT A FRYE HEARING ON BLOOD SPATTER EVIDENCE: THE BLOOD SPATTER EVIDENCE PREJUDICED APPELLANT BECAUSE THE STATE USED IT TO REBUT APPELLANT'S ACCOUNT OF THE SEQUENCE OF EVENTS.

(A) Standard of review.

The decision on whether to conduct a Frye hearing is a de novo question of law. See Fones v. State, 765 So.2d 849 (Fla. 4th DCA 2000); Kennedy v. State, 853 So.2d 571 (Fla. 4th DCA 2003).

(B) When a Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) hearing is necessary.

Florida courts have held that a trial court must conduct a Frye hearing to determine the scientific validity of scientific theories and techniques used by an expert and whether the general scientific community accepts these theories and techniques. Arnold v. State, 807 So.2d 136 (Fla. 4th DCA 2002) If a witness testifies as to pure opinion, without any reference to new or novel scientific principles, then a Frye hearing is not necessary. Fones v. State, 765 So.2d 849 (Fla. 4th DCA 2000).

In this case, the state produces a blood spatter, blood stain expert. Appellant specifically requested a Frye hearing. Appellant noted that Florida courts had not "Frye tested" this type of evidence as used in this case. The state argued that there was no need for a Frye hearing because other courts had permitted the introduction of such evidence.

The state's witness in this case, Ms. Ballou, referred to herself as a scientist and she stated she employed scientific

principles to arrive at her conclusions. A careful reading of the record in this case, will demonstrate that Ballou did not reveal the scientific theories/techniques she used to arrive at her conclusions. However, as an initial threshold question, this case is not a matter of pure expert opinion (no need for Frye analysis); this case is subject to Frye analysis because Ballou claims she was a scientist. Blood spatter/blood stain analysis, by definition, could involve various scientific theories/techniques: physics, viscosity of liquids, absorption capability of different materials, chemistry (reaction of blood to certain materials), geometry and mathematics. Ballou testified she did use certain geometrical principles. The question in this case is whether the principles and techniques were new or novel.

Ballou did not testify as to the scientific theories/principles she used (other than a cursory reference to geometry). There was no evidence whatsoever as to the science Ballou used. She called herself a scientist but she did not

describe the scientific methods she used. The testimony in this case gives no assurance whatsoever that the techniques/theories used by Ballou were valid.

C. Prejudice to Appellant.

Ballou's testimony significantly prejudiced Appellant. The state called Ballou as a rebuttal witness. Appellant objected to her testimony as rebuttal. The trial court overruled the objection and found that her testimony was relevant to rebut Appellant's version of events and their sequence; Appellant's experts relied in part, upon Appellant's version of the events to establish his insanity. Therefore, if the jury accepted Ballou's testimony, then the jury could have rejected Appellant's defense of insanity.

The harmless error standard does apply to a decision about a Frye hearing. Roeling v. State, 880 So.2d 1234 (Fla. 1st DCA 2004); Green v. State, 826 So.2d 351 (Fla. 2d DCA 2002) Given the state's reason for and the use of Ballou's rebuttal testimony, the state cannot establish beyond a reasonable doubt

that the error is harmless. Conner v. State, 910 So.2d 313 (Fla. 5th DCA 2005) The jury **had** to consider Ballou's testimony in relation to the question of whether the insanity defense was viable.

Ballou testified that from her analysis of the blood spatter/stain evidence, Appellant's version of what happened was inconsistent with her analysis. She also reconstructed a sequence of events that was inconsistent with Appellant's statements about what happened. The timing sequence and location of the events in this case were critical to Appellant's claim of insanity - Appellant's insanity defense was that the victim hit him in the head with a hammer - the blow damaged his frontal lobes such that he went into an insane delirium. Ballou's testimony may (probably) have been the reason that the jury rejected the insanity defense because the defense experts relied upon Appellant's version of events to establish the insanity defense.

CONCLUSION

This court should remand this cause for a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 1st day of June, 2006 to: Bonnie Parrish, Assistant Attorney General, Attorney General's Office, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118.

/s/ James T. Miller
James T. Miller

CERTIFICATION OF TYPEFACE COMPLIANCE

Appellant certifies the type size and font used in this brief is Courier New 12.